

THE CONSTITUTION OF THE UNITED STATES
ITS ORIGIN AND DISTINCTIVE FEATURES
THEODORE E. BURTON

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THE CONSTITUTION OF THE
UNITED STATES

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THE CUTLER LECTURE
FOR 1922

THE CONSTITUTION OF THE UNITED STATES

ITS ORIGIN AND DISTINCTIVE FEATURES

LECTURE ON THE CUTLER FOUNDATION AT
THE UNIVERSITY OF ROCHESTER

BY

THEODORE E. BURTON



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THE CUTLER LECTURES

ESTABLISHED IN
THE UNIVERSITY OF ROCHESTER
BY JAMES GOOLD CUTLER

It appears to me that the most useful contribution which I can make to promote the making of democracy safe for the world (to invert Mr. Wilson's aphorism) is to found in The University of Rochester, a course of lectures, designed to promote serious consideration, and consideration by as many people as possible, of certain points fundamental, and therefore vital, to the permanence of constitutional government in the United States.

My basic proposition is that our political system breaks down, when and where it fails, because of lack of a sound education of the people for whom and by whom it is intended to be carried on:

- (a) In its principles;
- (b) In its historical development as illustrating the application of it to and under changing conditions, and
- (c) In those moral standards, perhaps best to be developed in religious teaching but not safely to be separated entirely from University work.

FROM MR. CUTLER'S LETTER TO THE PRESIDENT OF
THE UNIVERSITY

THE CONSTITUTION OF THE UNITED STATES

ITS ORIGIN AND DISTINCTIVE FEATURES

It was a highly creditable act of Mr. Cutler's to provide for these lectures on a very serious and important topic. Many forms of entertainment are available to the people. Those who desire exhilaration for the wearied spirit can find it in ragtime music and in the strains of the jazz band; seekers for inspiration will be pleased by such music as that to which we have listened this evening from the High School Band and from the College Glee Club; those who are fond of boisterous amusement can obtain it from vaudeville; those who are anxious for thrills can find them in the lower grade of the movies and in the sensational newspapers; but tonight your attention is invited to a thoughtful study of the Constitution of the United States.

The Constitution of the United States has distinctive features of surpassing benefit. It has also operated in a theatre of action having very marked distinctive features. In considering the scope and operation of this Constitution it is well that we should study the fundamental facts and the historic background which give to this remarkable instrument its exceptional excellence as a bulwark of liberty and the source of national strength and security. What is there and what has transpired here which has destined our country to become the greatest of nations and to establish for our Constitution an assured position as the most effective document for giving shape to the future of a people?

In the upbuilding of every state or nation two great factors must always be taken into account. One arises from physical conditions, the other from the mental and moral characteristics of its people, dependent very largely on the founders or early settlers of a country or community.

Man is the creature of physical surroundings and environment on the one hand, and of inherited ideals, traditions, and institutions on the other; both these give form and direction to his intellectual and physical type. Two opposing theories have been maintained. Stated in the extreme, one would make of human beings mere reflections of the mountains and the seas which surround them and of the skies which look down upon them. It is alleged that these externals, with their normal results, determine the character of men and of nations. Such factors as the quality of the soil, access to the sea, favoring conditions created by rivers which afford fertility and furnish arteries of commerce assume the utmost importance. It is maintained that impressive phenomena of nature such as mountains which cannot be pierced, or rivers which cannot be bridged, promote a spirit of awe, sometimes of superstition, and in their general effect are aids to a régime of despotism. This theory

received strong support from Mr. Buckle, whose works were very much in vogue half a century ago. In accordance with his ideas a Napoleon or a Washington would arise from the initiative furnished by physical conditions.

The other theory found perhaps its strongest advocate in Mr. Thomas Carlyle. His view was that the successive epochs of history center around some towering personality possessed of force and a broader vision of the future, who becomes a leader and creates new conditions and institutions. The most accurate generalization can be maintained by accepting a middle ground between these two conflicting opinions. Individuals and peoples experience modifications in their character and aspirations from their physical environment. No less they find examples and inspiration in the legacies of the past. Patriotism, courage, and lofty moral standards are not the mere result of atmosphere; neither are the conquering

spirit and vigorous national life determined by the plane of elevation above the level of the sea. Blood will tell. The influence of ancestry cannot be lost. Mental alertness is no doubt stimulated by favorable physical surroundings, but qualities that make for leadership are often a heritage extending back through generations and centuries. Ancient Athens, a light to the world contrasted with modern Athens, now without its ancient distinction, goes far to prove that the physical theory cannot be correct in tracing the history of a people.

Judged by the two controlling factors which have been mentioned, no nation ever had its beginnings under more favorable auspices than the United States of America. First, as regards physical conditions: the great variety of climate and of soil, treasures of the field, the forest, the mine and the sea, abundant means of transportation, like a beckoning hand gave promise to those who came here. The Republic of

China may be richer in agricultural resources, South Africa may have more abundant gold mines, the mountain chains of the Andes may afford a larger supply of various minerals, but in the combination of all these advantages the United States stands easily at the front. What were the mental and moral influences antecedent to the Constitution? In the first place, the inheritance of the Anglo-Saxon race, modified and somewhat improved by the infusion of other racial stocks in the early settlement. There was an adventurous spirit which caused the early settlers to cross the sea and engage in a contest with nature which gave promise of a brilliant future for the land to which they came. The controlling factor with many was to secure civil and religious liberty. A devout religious spirit gave color to their actions. The Colonists brought with them a capacity for government capable of development to the utmost. They early recognized the necessity for cooperative action, which

was accentuated by proximity to savage tribes of Indians and by the manifest advantages of united action. As we now look back upon these potent influences and survey this wondrous field of opportunity it is evident that certain events were sure to occur.

Invisible threads were woven into a web of destiny. The Colonists in time would become independent of the country from which they came. It was impossible that men of such a strong, self-reliant spirit would permanently remain under the domination of a government three thousand miles away, especially when that government did not carefully measure their interests and had but a vague conception of their aspirations. Again the benefits of union were sure to result in a united country on this side of the sea. The colonies constituted a geographical and political entity. Despite local jealousies and the obstacles arising from distance, inferior means of communication, and from pride

of separate control, all these were sure to be overcome by the all-compelling advantages of unity, a unity which was to be confirmed by more enduring bonds as science and invention furnished railways and canals and stimulated social and commercial intercourse. We may say with confidence that if the attempted secession of certain of the states in 1861 had succeeded, the separation could have been but temporary; the two portions rent asunder would either have come together again by amicable arrangement or the stronger would have subdued the weaker. It was inevitable that the domain of this new country should extend itself over the plains and mountains from the lesser to the greater ocean. Once beyond the hills and ranges of the Alleghanies, the army of pioneers, always advancing and never disbanding, was sure to organize into communities and commonwealths until the farther shore was reached. Still further, the marvelous extent of the area to be oc-

cupied and its unsurpassed diversity of resources were sure precursors of a nation of the greatest power and economic development and the greatest opportunity for the individual.

Such are the circumstances under which the Constitution of the United States was established and we can have but an imperfect understanding of this document if we do not have knowledge of that which preceded it.

A constitution as the term is employed in countries having popular institutions may be briefly defined as the fundamental law of a state asserting the principles upon which the government is founded and regulating the exercise of its sovereign powers. This definition plainly expresses the vital distinction between laws and policies which are fundamental and essentially permanent and those others which are without exceptional sanction and may be readily changed by the law-making power.

The scope as well as the definition of

constitutions has shown progressive development and reached a maximum of importance in the Federal Constitution of the United States. The term was frequently employed in antiquity. The Greek City States or Republics had their so-called constitutions. When analyzed, however, they show a greater similarity to ordinary statutes and ordinances than to permanent charters laying down fundamental principles. The Constitution of Athens is said to have been changed 22 times in a period of 200 years. These frequent changes were clearly incident to a political organization in which the ruling power was a popular assembly. Aristotle in his monumental work on politics enumerates a very large number of constitutions and dwells upon their respective qualities and excellencies. The only ordinance similar to a constitution like that of the United States under the Roman Republic was the Law of the Twelve Tables, or the *Lex Duodecim Tabularum*, but the term was applied un-

der the Empire to the statutes, ordinances, and rescripts issued by the Emperors. The term Constitution has been applied repeatedly to the conclusions of ecclesiastical councils and in a very important instance in the 12th century to the so-called Constitutions of Clarendon, which defined the respective jurisdictions of the civil and ecclesiastical bodies.

Viscount Bryce, who described political institutions here and everywhere with unusual discrimination, discarded the classification into written and unwritten constitutions and adopted the designation of Flexible and Rigid. Ours he would have classified as of the rigid type. In the wealth of his vocabulary, he also uses the terms "moving" and "stationary," "solid" and "fluid," and after dwelling upon the subject for a time, he raises the question whether we can properly speak of a constitution at all in states which like Rome and England draw no formal or technical distinction between ordinary laws and

those of permanence or fundamental character.

What were the original sources, historical or otherwise, of this Constitution? Mr. Gladstone said that it was the most wonderful work ever struck off at a given time by the brain and purpose of man. This statement must be accepted with qualifications. No such instrument could have been prepared by any body of men without the inheritance of many precedents and a full realization that the thoughts and conceptions of the moment are altogether eclipsed by the accumulated wisdom of the ages.

The historical foundations of the Constitution may be traced to several distinct sources. First, and principally, to those great principles which had taken deep root in the motherland through centuries of gradual growth, marked by recurring protests against the exactions of royal prerogative, as exemplified by Magna Charta in 1215, the Bill of Rights of 1689, and the Habeas Corpus Act of 1697. With them

may be considered the Petition of Rights of 1627 and the Act of Settlement of 1700. A proposed constitution prepared by Oliver Cromwell for submission to the Long Parliament affords an interesting sidelight for the students of Politics.

The assertion of principles of liberty and of popular government, measures for the security of property and the maintenance of law and order in England were gradual, but uniformly progressive. Three-fourths of the inhabitants of the Colonies were of English birth or descent, and all were steeped, it may be said, in the traditions of English law, literature, and government. Edmund Burke in an eloquent defense of the Colonists while asserting the reasons for their desire for liberty of action very appropriately said, "First, they are Englishmen."

When we survey the conditions which led to the Revolution of 1776, it must be admitted that it was not so much an uprising against the English people, certainly

not against the principles of the English Constitution, but against an arbitrary administration under King George the Third and his Ministers. It was repeatedly asserted by the Colonists, and by none more than by Washington, that their attachment to England was deep and sincere and there was a constant appeal for the maintenance in the new world of the principles which were regarded as fundamental in England.

Next to this source may be ranked the charters granted by the crown, modified and enlarged by provisions for a certain amount of local autonomy in the respective colonies. Some of these were characterized by a considerable degree of liberality and afforded opportunity for the framing of constitutions suitable for the government of free peoples. One of the most liberal was the Royal Charter of Rhode Island of 1644.

A third source may be found in the Bills of Rights and Constitutions framed by the

independent action of the Colonists. The frame-work of the articles of the Confederation, even the Declaration of Independence and many essential provisions of the Constitution itself were derived in a large degree from prior documents in which the various colonies had asserted the right to individual freedom. Among these should be mentioned the written constitution of three towns of Connecticut, Windsor, Wethersfield and Hartford of 1639, which was the first written constitution enacted by the independent act of the people. The Massachusetts Body of Liberties of 1641 was a notable document and exercised a potent influence as a guide for the assertion of rights. The compact concluded on the *Mayflower* November 11, 1620, providing for the formation of a body politic should not be left out of account. The laws of New York indicated a closer conformity to the laws and policies of England than in any other of the colonies. At a later time under a recommendation from the Con-

gress of the Colonies, made on the 15th day of May, 1776, eleven of them adopted constitutions. The Bill of Rights and Constitution of Virginia was the earliest and most notable of these. George Mason and James Madison took part in the Virginia Convention and thus acquired training for the task of 1787. Practically all these constitutions were characterized by a disposition to exalt legislative power and displayed a reaction against executive authority due to the arbitrary conduct of various royal governors. Executive power was hedged in by severe limitations. Governors and judges were to be chosen by the legislatures in many instances, and both by these constitutions and by that of the Confederation, continuous tenure in all official positions was unfavorably regarded. These provisions afforded an impressive lesson, not merely by that in which they succeeded, but more in that in which they failed, for their inefficiency in accom-

plishing the desired results was a forcible argument for a strong executive.

The commercial motive—the removal of restrictions upon interstate trade—must not be omitted as a moving factor in the adoption of the constitution. With this purpose in view delegates from Virginia and Maryland had met in Alexandria in 1785 and had conferred with Washington. A later gathering with a kindred object had convened at Annapolis in 1786 in pursuance of a resolution of the legislature of Virginia. Here representatives from five states were present and Alexander Hamilton offered a resolution which was adopted for the holding of a Constitutional Convention at Philadelphia in May of 1787. The purport of this resolution was merely a revision of the existing Articles of Confederation, but the delegates bravely undertook the task of framing a Constitution.

There are certain features of the Constitution of the United States which clearly

distinguish it from other instruments which have received the name of Constitution. First, it was the expression in a single document, in permanent and definite form, of the will of a free people insistent upon the rights of the citizen or individual as against the control of a monarch or ruler or any kind of arbitrary power. In the olden time laws and constitutions had proceeded from the sovereign and concessions were wrung from unwilling monarchs, as in the case of Magna Charta, which King John was compelled to sign in the 13th century, saying: "They have given me four and twenty over-kings."*

The fundamental principles laid down

* An interesting illustration of modern iconoclasm is found in an article by Prof. Edward Jenks in the *Independent Review* of November, 1903, entitled "The Myth of Magna Charta." The writer maintains that the so-called Great Charter was not helpful to liberty nor a landmark in constitutional progress, but a stumbling-block to the generation which came after it. It is termed a conspiracy of self-seeking and reckless barons who wrung from a worthless monarch the concession of feudal privileges.

by it, already partially outlined in the Declaration of Independence and in many pre-constitutional documents, were the expression of the aspirations of a people whose primary objects were liberty and equality.

A prominent fact in the framing of the Constitution was the calmness and rational spirit which characterized the deliberations of the Convention. There was an absence of class antagonism and of that racial repulsion so often in evidence in other countries. No empty declamation found a place in its clear and concise phraseology. Of the French Declaration by the Constituent Assembly of August 26, 1789, the year in which our Constitution became effective, it has been said, "Its empty pathos confused the mind, disturbed calm judgment, aroused passions and stifled the sense of duty—for about duty there is not a word."

Second, the Constitution of the United States secures, in a degree not known before, the permanence of rules and princi-

ples regarded as essential for a stable government and for securing the rights which its framers cherished. It has been termed a formidable apparatus for the prevention of sudden change. The nature of the document promoted conservatism among the people. In the sixty-one years from 1804 to 1865 not a single amendment was adopted. In the five years from 1865 to 1870 the 13th, 14th and 15th amendments were ratified. Then after an interval of forty-three years the 16th, 17th, 18th and 19th amendments followed, providing respectively for income taxes, direct election of United States Senators by the people, Prohibition, and Woman Suffrage. The last twelve years may be termed the Progressive Period in American Politics and have been contemporaneous with progressive movements for more liberal democratic institutions in every grand division on the globe.

Third, the Constitution of the United States does not prescribe a form of gov-

ernment which can be regarded as an advanced democracy. It should always be borne in mind that two ideas were always present in the minds of its founders, one that the people should rule, the other that the will of the people should be deliberately expressed and only after the exercise of mature consideration. It has been said that the framers were equally afraid of the despot and the mob. The idea of control by a popular assembly was rejected as altogether impracticable and dangerous. It was a saying of James Madison—sometimes ascribed to Hamilton—that though every member of the Athenian Assembly had been a Socrates, the aggregate body would have been a mob. Legislative authority was vested in Representatives who were expected to be chosen for their superior ability and to render more excellent service as the result of experience. The desire to avoid hasty or ill-judged action is illustrated by the creation of a legislature consisting of two chambers instead of

one, a House elected for two years and a Senate for six years, the members of which latter body were originally chosen by state legislatures, and by the vesting of very extensive powers in the President including a veto not to be overridden or nullified except by a two-thirds vote of both Houses. Members of the Cabinet retain their positions, notwithstanding an adverse majority in the Congress. There is also the requirement that no amendment shall be proposed except by a vote of two-thirds of both Houses of Congress or at a convention on the application of the legislatures of two-thirds of the States—an application never yet made—and three-fourths of the States must ratify before it becomes effective.

In none of the provisions of the Constitution is the intention to prevent sudden change or to guard against the excesses of unrestrained democracy more carefully guarded than in this method for the adoption of amendments. It is equally a safe-

guard against the exercise of arbitrary power.

Other countries have adopted a variety of regulations in this regard; in some modifications are more difficult of accomplishment. By the Constitution of the Empire of Japan, the sole right to propose amendments rests with the Emperor. In the Empire of Russia the right belonged to the Czar. In the German Empire the procedure was identical with ordinary legislation, that is, by the action of the Reichstag and Bundesrath, but 14 negative votes in the Bundesrath meant the rejection of any proposal. As Prussia had 17 votes in that body her dominant position was evident. In Italy the fundamental law or constitution promulgated in Piedmont in 1848 and extended to the whole kingdom makes no provision for amendment, though changes in fundamental policies have been frequent. In other countries changes are more readily made, though it must be said that in most of them amend-

ments have not been adopted in so considerable a number or upon questions of such vital importance as in this country. In France by the Law of 1875, amendments may be proposed by the President or by either the Chamber of Deputies or the Senate. Each Chamber must vote that an amendment or revision is necessary. The questions of adoption or rejection must be determined in a joint session of both houses. In certain states the decision is left to two successive parliaments or congresses, the first proposing and the second—presumably selected with a view to its attitude on the proposal—having the right to ratify. In some of these states ratification requires a mere majority, in others a larger proportion, most frequently two-thirds. The rule requiring action by two successive legislatures prevails in Belgium, where the adoption of a proposal for an amendment *ipso facto* dissolves the Parliament, also in Chile, Denmark, Sweden, Norway, the Netherlands and in the newly

established Kingdom of Yugoslavia where there is but one legislative chamber. The constitutions of Switzerland, Australia, and Mexico resemble that of the United States in that approval by the separate states is necessary. In Switzerland and Australia a majority vote of the electors in the whole country is required to ratify an amendment and a favorable vote in a majority of the cantons or states as well. In Mexico an amendment must be submitted by a two-thirds vote of the Federal Congress and ratified by the legislatures of a majority of the states. A tendency to diminish the differences in methods for the adoption or enactment of constitutional provisions and ordinary laws has become manifest in several recently established European countries and in some of the states of the American Union. In the recently framed constitutions of Austria, Czechoslovakia, and Poland, it is not necessary to postpone consideration until another legislature is chosen. In Austria

an amendment may be adopted by a majority of the Congress in which the proposal is made by a mere majority, in Czechoslovakia by a three-fifths vote and in Poland by two-thirds. In some state constitutions in the United States where the initiative is in vogue, there is little distinction between the methods pertaining to constitutions and ordinary laws.

The absence of active propaganda for a change in the Federal Constitution in this respect, proves the conviction of the people of the wisdom of existing provisions.

Federal Judges are not elected by the people, but chosen by the Executive.

The exercise of the treaty-making power was very carefully guarded. The negotiation of treaties by the President, by and with the advice and consent of the Senate, is authorized provided two-thirds of the Senators present concur. In the early days of the Republic there was a dread of treaties with foreign nations

which controlled the opinions of some leading statesmen. Hamilton was not one of them. He maintained that our government should have the same attributes and the same authority in this regard as any sovereign power. Jefferson once said that no harm would be done if the treaty-making power was annihilated entirely except in the making of treaties of peace. As a matter of history in this country, the making of treaties has required a nearer approach to unanimity than almost any other form of governmental action.

Lastly, this feature is emphasized by the authority vested in a Supreme Court to declare laws both of the Congress and of the states invalid if not in conformity with the Constitution and to define the limits of executive power. In this particular it differs very substantially from the so-called Constitution of England under which laws enacted by Parliament cannot be questioned by the Courts. It has been correctly stated that the legislative branch might revoke

Magna Charta or repeal the Habeas Corpus Act, though this is a practical impossibility. In France the interpretation of constitutional provisions belongs to the Legislature. In the late Empire of Germany, according to the opinion of her most prominent publicists, the decision rested with the Emperor.

No such authority has been granted to the Judiciary of any other country. Members of the Constitutional Convention had read with attention the work of Montesquieu on the Spirit of the Laws. He had written "There is no liberty if the power of judging be not separate from the legislative and executive powers."

The Supreme Court acts as a restraint, a mentor it may be called, upon both executives and legislators and thus ours is a "Government of Laws and not of Men." This unique division gives to jurists removed from the faction and turmoil incident to the activities of the other two branches of the government responsibility

for preventing alike those who make and those who execute the laws from overstepping the bounds of their authority. It settles controversies between states and safeguards the rights of the people in every way. Yet this august tribunal has by no means stood in the way of rational progress. Occasional decisions have been rendered which were considered as reactionary, notably that in the Dred Scott Case, which has been regarded as a blemish on the jurisprudence of this country.

Essential development and change have been recognized by interpretation in a variety of notable decisions by a great array of Justices from Marshall to Taft, also by occasional modification and even the reversal of earlier opinions when newly arising conditions made it necessary. The Supreme Court has not been unmindful of changing situations nor has it ignored currents of popular opinion. For instance, fifty years ago laws in regard to hours of labor and providing for the welfare of

women and children might have been thrown out of court. Senator Root in a very able argument maintained that the Prohibition Amendment was not within the scope of the Federal Constitution, because that document had to do with things political and not with those of a social aspect. But the Court did not sustain his position. In the more intricate relations of modern life a very considerable number of questions which formerly were not regarded as proper subjects for the law-making power are now held to be matters of general concern.

Another distinctive feature is the recognition of two sovereignties, national and state. This has met with a success unsurpassed in any mere league or federation of states or in any centralized government. The duties of the Federal Government are primarily political having exclusive control of international questions and of a wide variety of activities essential to united action as a nation, duties and responsibilities

necessary for national strength and security. The state governments retain those duties which may be termed domestic or social and exhibit a great diversity of laws and usages. This division is required to promote initiative and secure a large degree of freedom of action in communities jealous of their rights. It is a survival of conditions which existed before the Constitution. The division is also necessary to prevent the central government from undertaking the exercise of too large a number of sovereign rights, the performance of which would be impossible because of the magnitude of the problem. With the closer interrelation of states and communities it is inevitable that the federal powers should increase. It is to be hoped, however, that state boundaries will not become mere vanishing traces upon the map. The relation between state and federal jurisdiction must, necessarily, depend in a large degree upon the relative efficiency of the two. If either fails to satisfy the growing demands

of a forward-looking people the other is sure to encroach upon it.

A further characteristic of the Constitution appears in its combination of comprehensiveness and brevity. It is neither lacking in fundamentals nor burdened with non-essential details. It is in marked contrast with other documents having only a few central ideas and consisting mostly of a declaration of principles. The Republic of China, established in 1912, one of the newest attempts for popular institutions—after struggling long with the problems which confronted the new state reached final agreement only upon the method of selecting a President. Other constitutions are of unnecessary length and complexity. Large powers and responsibilities were left to the Congress by the Federal Constitution, but minute or temporary regulations were to be provided by statutory enactments. Those who wrote it intelligently forecast the need of provisions adaptable to changing conditions and fu-

ture development in an ever widening sphere of action. This fundamental charter does, however, define a carefully devised framework of government, the relation of the government to the governed and of the governed to each other, also the sphere of the three great branches and the methods of their operation. It secures the protection of fundamental rights and sets forth the means for change in case the people shall regard changes as desirable. It was expected that the requirements of the future would be met by the enactment of well-considered statutes conformable to the Constitution, and lastly by constitutional amendment. In only one case is a crime defined, that of treason, "which shall consist only in levying war against the United States or in adhering to their enemies giving them aid and comfort."

What are some of the dangers which threaten? They have been admirably stated in the letter of the founder of this course of lectures, Mr. Cutler: The lack

of a sound education in its principles. It is surprising that so few have carefully read this great document. Legislatures have enacted laws and executive officers have made appointments and taken action in ignorance of its most elementary provisions, but these occasional aberrations are not to be compared with the general lack of interest and thorough study of the organic law which is the foundation and central feature of all our political institutions. True, there are many factors which divert attention to less important things. Mr. Wendell Phillips once remarked that the favorite exordium of American orators was in the words, "We live in an extraordinary age." Indeed we do live in a most extraordinary age, characterized by startling changes from year to year, with an ever increasing development of material wealth and the luxuries of life.

It is hardly possible that a people of so restless and aggressive a type should dwell in the midst of such opportunities without

the appearance, on the reverse side of the shield which protects us from the foreign foe and from domestic misfortune, of conditions which make for demoralization and decay.

The ease with which the means of subsistence are secured and the far larger rewards of fortune available to so many, not only turn the minds of a vast multitude from considerations of the state and the general welfare of the people, but as by a plunge involve a great mass of the population in such pursuit of pleasure and amusement as to create ideals altogether alien from those of the struggling Colonists and from those of the Fathers of the Republic. Even the most colossal war the world has ever known has not sufficiently taught the lesson of individual self-denial or of patriotism. The spiritual awakening which it was hoped would follow so momentous a struggle has not materialized. At times it would seem that the contest has accentuated the prevalence of self-indulgence and

fostered the evils of extravagance and display. The profiteer is still very active and the formation of so-called blocs for the promotion of class interests has assumed a prominence unknown before. For all these evils there can be but one remedy, the moral and mental education of the people, an abiding conviction that the happiness and prosperity of each is inseparably entwined with that of all, a feeling that the unprecedented privileges which the American citizen enjoys are due in largest measure to the government under which he lives and to the Constitution which gives to that government its direction. In the necessary training for this, the schools and universities of the country have a duty to perform, from which no pride of scholarship or distinction in the achievements of science or research can absolve them. Their teachings should constantly lay stress upon a thorough understanding of the principles of the Constitution and the possibilities of development under its provisions, so per-

fectly suited to all changes and indeed to all time.

In numerous states of the Union there have been departures from the fundamental principles laid down at the Convention in 1787. It was one of the elementary ideas of the founders that this should be a representative government. Notwithstanding the beneficent results achieved by town meetings in New England and elsewhere, these were regarded as applicable only to small communities. In the vaster interests and responsibilities which pertain to a nation of unlimited possibilities it was believed that picked men educated in politics and possessed of discernment of national problems could render far better service in meeting the actual needs of the people and in giving statutory form to such impulses as promise benefits and are not merely the creation of the fleeting hour.

Mention may be made of modern innovations such as the direct primary, the

referendum, and the initiative. It is not wise to visit upon either of these words of sweeping condemnation, because each may have its proper place in the body politic. The direct primary, though contrary to long-established usage, may well be employed in communities where the political domination of bosses has led to disregard for the ideals of the electorate or promoted alliances with corrupt interests. This method is much more desirable in a state of smaller population, as in the case of Oregon, where there is a homogeneous population, than in the Empire State with its more than ten millions of people and an infinite variety of interests. It is safer in the case of candidates for office of such importance that their qualifications are measured and popular interest is awakened, as in the case of mayors, congressmen, or governors. It is less successful in the choosing of candidates of special or technical qualifications such as judges. The primary involves expensive and sometimes

doubtful methods in awakening the voters from their lethargy and lays a double burden upon candidates, often imposing the necessity for distasteful appeals in order to obtain votes. A repugnance for election methods commonly resorted to in primaries deters many having most excellent qualifications from becoming candidates. It is, however, one of the prerogatives of a Democracy to try out experiments and even to make mistakes, and if after trial direct primaries prove to be unsatisfactory, they may be abandoned.

Similar considerations apply to the referendum. A minority insistent and powerful, fortified, as is usually the case, with plausible arguments and made up of those who prize some individual or local interest more than the principles in which the mass of the people are interested may prevail upon the legislature of a state, or the governing body of a city, to adopt measures which the great body of the voters less active and not readily aroused regard with

disapproval. Such minorities are especially influential in states and communities where political parties are evenly divided and it will sometimes be well to submit measures passed in response to their influence to popular vote.

The same is true of the initiative. A consolidated interest or a well-organized minority may prevent the enactment of legislation beneficial to the public. Either of these last-named methods, however, is in danger of excess. It is not well to make them a general substitute for well-established systems. Both the initiative and the referendum are objectionable where the mind of the wearied voter is so confused by a multitude of proposals that he does not know which way to turn. Resort should not be had to either unless a limited number of propositions be submitted at one time, of such a nature that their purport can be readily understood. The circulation of petitions for a referendum or an initiative by paid solicitors is especially to be

condemned. Propositions have not been lacking for the extension of the direct primary to the nomination of presidential candidates and for giving national scope to the initiative and referendum. But such plans, at least under present conditions, may be dismissed as impracticable. The procedure involved would be on so vast a scale as to be staggering. It would give to states of largest population an undue and unbalanced influence. All states would be deprived of the cherished right to adopt methods of their own choosing which they regard as best adapted to local conditions. There would be an ever present danger of injudicious results either in times of passing excitement or of indifference, and thus a fundamental idea of the Federal Constitution that political action should be based upon intelligent understanding and mature deliberation would be nullified.

In all our study of public questions the one dominant consideration must be that right action and efficient administration

depend upon the general standards and ideals of the people; the helpfulness of mere methods, though these may be important, is not so efficacious as a well-educated popular opinion and civic spirit, improvement in which is the one reform most to be desired. Human nature cannot be changed by the adoption of new measures for the selection of officials or the enactment of laws. Let him who thinks to reform a state or nation by the changes in the mechanism of political action which have been proposed dismiss his arguments for silly season discussion.

More vital, more palpably violative of the principles of the Constitution are propositions for the recall of judges and the revocation of judicial decisions. Consider it as we may, the great balance wheel of American institutions, in nation and in state, has been the Judiciary. In many branches of jurisprudence judges have shown greater aptitude in establishing rules of law than the less carefully consid-

ered enactments of legislatures. If this is true of legislative bodies, how much more must it be true of the great mass of the people. The Judiciary constitutes a barrier against the sudden attacks of impulse or passion, an example of the illuminating light which trained minds can give when removed from the hurly-burly of ordinary political action. One main objection to the recall of judges is that it threatens the substitution of cowardice for courage in the action of the Judiciary and gives to the desire for popular favor an incentive more compelling than the dispensation of exact justice between man and man. Equally objectionable is the proposed recall or revocation of judicial decisions by popular vote, for which there has been an active propaganda. This would mean that after a question of intricacy and difficulty has been elaborately argued by lawyers and a conclusion reached by a judge or judges expert in the administration of the law an appeal might be taken to the general body

of voters, many of them indifferent and none giving the same careful attention to the problems involved. Unlimited opportunity would be afforded for the demagogue and the play of selfish interests. There could be no fixed principles to be relied upon, for a question might be decided in one way at one time or in one jurisdiction and in another way in another jurisdiction or at another time. A new class of problems would be repeatedly presented to the average voter for the solution of which he has neither aptitude nor time for adequate study. Logically, if the decisions of courts are to be revoked, a popular vote might be taken to reverse or to confirm the sentence of a criminal guilty of a flagrant crime. It is no mere conjecture that an offender belonging to a numerous clique or regarded as a hero for his bravado or some attractive quality might be freed as the result of an active campaign on his behalf.

The agitation for the recall of judges and judicial decisions reached its maxi-

mum strength about ten years ago, when one of the strongest political movements of the time was for larger participation by the individual citizen in public affairs, as illustrated by the demands already mentioned for the direct primary, the initiative, and the referendum. Issues fit to absorb general attention were lacking and there was a loss in the prestige of legislative bodies, as well as a severe criticism of the action of party conventions. The movement for recall of judges and judicial decisions seems to be waning, but more recently there is an agitation of a similar nature for a constitutional amendment giving to Congress the right to reverse a decision of the Supreme Court, say by a two-thirds vote of both Houses. Such a proposition is so absolutely subversive of the very fundamental ideas of the Federal Constitution that it is difficult to understand how it can be considered seriously. It would make the legislative branch supreme, thereby destroying that balance of

powers which is the central feature of our political system. The assurance of mature deliberation and impartiality of judgment so strenuously insisted upon by the fathers would be succeeded by a perpetual threat of precipitate action and class domination. The majority may rule in general policies but certain rights exist with which no majority should interfere. On certain basic principles or facts all popular governments must rest. First, the right to rule must be vested somewhere or anarchy will prevail. Second, there is so far a common interest and a common purpose among all the governed in a state or nation that the majority may be given authority without danger of injustice to the minority or to any part. In passing, it may be remarked that if there is such repulsion that a common interest or a common purpose does not exist, then there is an absence of the conditions which make for the maintenance of popular rule. Third, there are personal rights belonging to individuals that arise

from natural law which no government can take away, "inalienable rights" they have been termed. These personal rights are of course not absolute. They are subject to limitation and, in certain circumstances, to withdrawal, but by the fundamental tenets of our Constitution, the limitation or withdrawal of these natural rights must, in the last resort, be left to the Judiciary, otherwise they might be destroyed.

A question which must always assume the utmost importance in any popular government is the rights of the minority as against the majority. The illustration has been well made by President Lowell that if three outlaws met a victim on the highway, the rule of the majority should not have application, and in the adjustment of the various relations between man and man there is no protection for the individual unless the rights of the majority be exercised with moderation and with due regard for those who though lesser in number are

equal in right. There is no field in which this question has present application more worthy of note than in the exercise of the right of taxation and the appropriation of public funds.

The Constitution gives to the popular branch of Congress the initiation of revenue bills. This as clearly as any provision in the Constitution is derived from the policies of England, where the King had sought to lay heavy impositions upon his subjects. Custom has also given to the same branch of Congress the initiation of appropriations. This power has usually been most wisely exercised, but in a time of prodigality and extravagance like the present the virtue of economy is likely to be obscured. Serious errors are prevalent in regard to the sharing of public expenses. Time and trial will prove that lavish expenditures do not rest merely upon those who make payments to the tax collector, but upon all, and oftentimes more heavily upon those of limited means, as

exemplified in increased cost of living and widespread unemployment. It is to be hoped that experience will cause the abandonment of prodigality and recognize the homely virtues of thrift and a proper balance between income and outgo.

The Constitution of the United States forbade any religious test for office, also any law respecting an establishment of religion or prohibiting the free exercise thereof. There was to be no established church and no restraint upon conscience. Not only was this in accordance with the general trend of the Constitution, but the great variety of religious denominations which existed in the country at the time made any one favored church impossible. At the same time adherence to the Christian religion and regard for its precepts had taken deep root among the earlier inhabitants of the United States. The religious spirit, eclipsed somewhat in the latter half of the 18th century, has now a vitality and a general acceptance nowhere

surpassed. Apart from the teachings of the sacred scriptures attention should be called to their surpassing literary value, their majesty of thought and excellence of diction. Not to mention a crowding multitude of familiar passages which have been a guide and an inspiration, reference may be made to the 28th chapter of the Book of Job, and the sublime utterance of the Man of Galilee, equal to anything that may be found in all poetry or the drama: "Consider the lilies of the field, how they grow; they toil not, neither do they spin; yet I say unto you that even Solomon, in all his glory, was not arrayed like one of these." It is only by the observance of the doctrines of Christianity, by the promotion of the religious life, that a people can be saved from the dangers which spring from vicious ideals and reckless anarchy. Side by side with the lessons of patriotism constant heed should be given to the teachings of the Christian religion; indeed it is that religion from which may be derived not

merely precepts which teach responsibilities to the Creator, and goodness and mercy to fellow men, but those enduring principles of justice and of right which furnish the enduring foundations for states and nations.

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